

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT – DIV. I
CIVIL ACTION NO. 11-CI-00935**

COMMONWEALTH OF KENTUCKY
ex rel. JACK CONWAY, Attorney General,

PLAINTIFF

v.

FIRST DATABANK, INC., a wholly-owned
subsidiary of the Hearst Corporation,
a Missouri corporation
701 Gateway Blvd., Suite 600
South San Francisco, CA 94080
SERVE: VIA SECRETARY OF STATE PER K.R.S. 454.210

DEFENDANT

and

McKESSON CORPORATION
One Post Street
San Francisco, CA 94104
SERVE: VIA SECRETARY OF STATE PER K.R.S. 454.210

DEFENDANT

FIRST AMENDED COMPLAINT

I. INTRODUCTION

1. This is a civil enforcement action brought by the Commonwealth of Kentucky (“the Commonwealth”) under state statutory and common law on behalf of the Kentucky Cabinet for Health and Family Services’ Medicaid program (“Kentucky Medicaid” or “HFS”) by and through its Attorney General, against First DataBank, Inc. (“First DataBank”) and McKesson Corporation (“McKesson”), (hereinafter referred to collectively as the “defendants”), seeking damages, statutory civil penalties, and other relief.

2. The Commonwealth alleges that the defendants violated various state statutes and common law in connection with a scheme through which, over nearly a decade, the defendants published and reported to the Commonwealth false, fraudulent, and inflated average wholesale

prices (“AWPs”) for more than 1,800 brand-name prescription drug products, causing its Medicaid program to overpay for these drugs by tens of millions of dollars. More specifically, the Commonwealth alleges that the defendants entered into a scheme through which they fraudulently inflated the AWPs published by First DataBank for these brand-name prescription drugs knowing, expecting, and intending that the Kentucky Medicaid program would, and was required by law to, use the inflated AWPs in order to calculate how much to reimburse pharmacies and other providers that dispensed or administered these products to eligible Medicaid beneficiaries. As an intended consequence of the scheme, the Commonwealth overpaid these Medicaid providers when reimbursing them based on these fraudulently inflated AWPs.

3. The Commonwealth seeks damages, civil penalties, injunctive relief, and other relief deemed appropriate by the court to make the Commonwealth whole for its overpayments and to ensure that the defendants do not engage in similar misconduct in the future.

II. THE PARTIES

4. Plaintiff is the Commonwealth of Kentucky (“Kentucky” or “Commonwealth”), which brings this action on behalf of the Kentucky Medicaid program, by and through its Attorney General.

5. The Attorney General is authorized to bring this action on behalf of the Commonwealth of Kentucky and the Kentucky Cabinet for Health and Family Services by virtue of KRS 15.020.

6. The Kentucky Medicaid program, like all state Medicaid programs, is run jointly by the federal and state government and administered by the Commonwealth to provide health

care services, including prescription drug benefits, to eligible beneficiaries (primarily the poor, elderly, disabled, and blind).

7. At all times relevant to this action, the Kentucky Medicaid program was administered by the Kentucky Cabinet for Health and Family Services.

8. First DataBank is a wholly-owned subsidiary of the Hearst Corporation and a Missouri corporation with its principal place of business in South San Francisco, California. It compiles and publishes pricing information, including average wholesale prices (“AWPs”), and other data regarding prescription drugs into a national compendium called the National Drug Data File (“NDDF”) that is licensed to, sold to, and used by, drug manufacturers, wholesalers, third party payers (including state Medicaid programs like Kentucky’s) and others.

9. At all times relevant to this action, First DataBank has transacted business in the Commonwealth of Kentucky by, including but not limited to, compiling, publishing, licensing, and/or selling pricing information regarding prescription drugs, including those identified in this Complaint, to purchasers within the Commonwealth.

10. At all times relevant to this action, Defendant First DataBank has licensed and/or sold pricing information, including average wholesale prices (“AWPs”), to the Kentucky Cabinet for Health and Family Services pursuant to license agreements with the Commonwealth and/or its fiscal agents for use by the Kentucky Medicaid program in determining the amount of reimbursement paid to providers for prescription drugs dispensed or administered to eligible Medicaid patients.

11. McKesson is a Delaware corporation with its principal place of business in San Francisco, California. At all times relevant to his action, McKesson was one of the three largest wholesalers of prescription drugs in the United States. McKesson purchased prescription drugs

from pharmaceutical manufacturers and resold them to retail providers, including pharmacies, physicians and clinics.

12. At all times relevant to this action, McKesson has transacted business in the Commonwealth of Kentucky by, including but not limited to, storing, distributing and/or selling prescription drugs, including the drugs identified in this Complaint, to purchasers within the Commonwealth.

III. FACTUAL BACKGROUND AND THE DEFENDANTS' SCHEME

13. Brand drugs typically are distributed in the following manner. The manufacturer sells and ships the drug to a wholesaler who then re-sells and ships the drug to a retail customer such as a pharmacy (in some instances, the manufacturer may sell and ship the drug directly to the pharmacy). A patient obtains a prescription from his or her doctor and takes it to the pharmacy to be filled. A pharmacy then fills the prescription and dispenses the drug to the patient. If the patient is covered by the Kentucky Medicaid program, the pharmacy (also called a "provider") submits a request for payment, called a "claim," to the Kentucky Medicaid agency through an electronic point of sale system. The claim identifies the drug and other information. If the claim is approved, the Kentucky Medicaid program makes a payment, called a "reimbursement," to the pharmacy.

14. At all times relevant to this action, it was necessary for the Kentucky Medicaid program to handle claims processing and reimbursement electronically through computer systems due to the number of prescription drugs in the market (tens of thousands), the number of pharmacies submitting claims (more than 1,000), and the number of claims submitted (on average more than 10 million per year).

15. Each prescription drug sold in the United States is identified by an 11-digit number called a national drug code (“NDC”) that is listed by the U.S. Food and Drug Administration. The first five digits identify the manufacturer, the next four digits identify the drug and dosage, and the last two digits identify the package size. During the time period relevant to this lawsuit, there were more than 60,000 different NDCs sold in the United States.

16. At all times relevant to this action, the Kentucky Medicaid program, like other state Medicaid programs, has been required by federal law and regulation to reimburse pharmacies and other providers for brand name prescription drugs based on the “estimated acquisition cost” (“EAC”) for each drug, defined by federal regulation as “the price generally and currently paid by providers for a drug.” 42 C.F.R. §447.502 (formerly §447.301).

17. At all times relevant to this action, state law and regulation required Kentucky Medicaid to reimburse providers for brand name prescription drugs based on the EAC for each drug, and to determine EAC based on the published average wholesale price (“AWP”) for each drug. *See* 907 KAR 1:018 and previously.

18. At all times relevant to this action, Kentucky Medicaid in fact reimbursed providers for brand name prescription drugs based on EAC and determined EAC based on the published AWP.

19. At all times relevant to this action, First DataBank’s National Drug Data File (“NDDF”) has been the only comprehensive, current, computerized database of prescription drug prices available in the marketplace.

20. At all times relevant to this action, Kentucky Medicaid obtained the AWP’s it utilized to determine EAC (and accordingly the amount of reimbursement to providers for brand

name prescription drugs) from First DataBank's NDDF pursuant to license agreements between First DataBank and Kentucky Medicaid and/or its fiscal agents.

21. At all times relevant to this action, the defendants knew that Kentucky Medicaid, like most state Medicaid agencies, reimbursed providers for brand name prescription drugs based on the AWP published by First DataBank.

22. As explained in greater detail below, the defendants engaged in a scheme by which they fraudulently inflated the AWP of thousands of NDCs, failed to disclose this to the Commonwealth, and actively concealed their misconduct. The intended and actual consequence of this scheme was to cause Kentucky Medicaid to pay pharmacies and other providers more in reimbursement than it would have paid if the AWP had not been fraudulently inflated.

23. At all times relevant to this action, when brand manufacturers introduced a drug into the market, they set and established a price called wholesale acquisition cost ("WAC") for the drug. Brand manufacturers announced and published their WACs in a variety of ways, including by reporting them to First DataBank, which in turn published them under the name WAC (at certain times First DataBank also referred to WAC as "WHN" or "wholesale net"). Brand manufacturers also reported their WACs to wholesalers, including McKesson.

24. Historically, when brand manufacturers introduced a drug into the market, they also set and reported a price called an average wholesale price ("AWP") for that drug, calculated by taking the WAC and adding either 20% or 25%. For example, if a brand manufacturer set a WAC of \$100, it set the AWP at either \$120 or \$125.

25. The percentage by which the AWP exceeded the WAC was known as the "WAC-to-AWP mark-up" or "spread." Prior to the inception of the defendants' scheme in August 2001, the WAC-to-AWP markup or spread of an NDC remained unchanged during the life of the NDC.

Thus, if the WAC increased, the AWP increased commensurately. For example, if the WAC was \$100 and the AWP was \$120 (a 20% mark-up or spread), when the WAC increased to \$150, the AWP increased to \$180, maintaining the 20% mark-up or spread. Brand manufacturers announced and published their AWP's in a variety of ways, including by reporting them to First DataBank, which in turn published them under the name AWP. Brand manufacturers also reported their AWP's to wholesalers, including McKesson.

26. As of the inception of the defendants' scheme in August 2001, the defendants knew that the prices paid by wholesalers to purchase brand drugs from manufacturers were very close to WAC (they were never higher than WAC, but could be reduced slightly by prompt pay or other discounts or rebates). Furthermore, as of the inception of the defendants' scheme in August 2001, the defendants knew that the prices charged by wholesalers to their retail customers such as pharmacies was also very close to WAC, as these prices were determined by adding a very small percentage to the prices paid by the wholesalers to purchase the drugs from the manufacturers. However, as explained earlier, the amount of money a retail provider such as a pharmacy received in reimbursement from state Medicaid agencies like Kentucky's was based on AWP.

27. Any difference between what retail providers such as pharmacies paid wholesalers to acquire brand name prescription drugs (which were based on, and very close to, WAC) and what they received in reimbursement (which was based on AWP) represented increased profits. Accordingly, the greater the mark-up or spread between WAC and AWP, the higher the providers' profits. At all times relevant to this action, the defendants knew this.

28. In or around August 2001, with specific intention to increase the AWP-based reimbursement amounts to be paid by the state Medicaid programs, including Kentucky's, and

other third party payers, McKesson proposed a scheme to First DataBank under which First DataBank would secretly and unilaterally increase or “bump up” the AWP’s it was publishing for drugs for which the manufacturers had historically used a 20% markup or spread to set AWP. McKesson proposed that First DataBank do so by increasing the WAC-to-AWP markup for the drugs with a 20% mark-up by 5 percentage points, *i.e.*, use the 25% markup instead of the 20% markup, causing the AWP’s published by First Databank for those drugs to be 5% higher than the AWP’s the drugs’ manufacturers were reporting and had historically reported.

29. McKesson proposed this scheme despite the fact that there was, and would be, no commensurate increase in the actual (WAC-based) prices wholesalers charged their retail customers for these drugs.

30. The fact that there was no commensurate increase in the actual (WAC-based) prices wholesalers charged their retail customers for these drugs was central to the defendants’ “bump-up” scheme. By increasing the AWP’s of the historically 20% spread drugs by an additional 5%, the defendants caused state Medicaid programs, including Kentucky’s, to pay higher reimbursements to the defendants’ customers, *i.e.*, retailer providers such as pharmacies, even though there had been no commensurate increase in the actual prices paid by these providers to wholesalers. By increasing the AWP’s for these drugs, the defendants used taxpayer money (in the case of public payers such as the Kentucky Medicaid program) to increase the profits of the defendants’ customers.

31. First DataBank agreed to McKesson’s proposal in around August 2001.

32. Pursuant to their agreement, and beginning in around September 2001, the defendants proceeded to implement the agreed bump-ups of the published AWP’s for more than 1,800 NDCs. The defendants continued to publish AWP’s based on the false, fraudulent, and

inflated markup until September 2009.

33. Each defendant had a financial interest and motive in carrying out the bump-up scheme, including but not limited to increasing the retail providers' profits in order to secure their good will. This was particularly important to McKesson, whose principal customers are pharmacies.

34. The defendants never disclosed the scheme to the Commonwealth of Kentucky. Indeed, the defendants concealed the bump-up and their role in implementing it by staggering publication of the fraudulently inflated AWP to coincide with general price increases announced by the relevant manufacturers. As a result, the 5% bump-up occurred at different times for different drugs. Manufacturers whose drugs were affected by the increase in WAC-to-AWP mark-up became aware of the bump-up but took no action to remedy it or to notify the Kentucky Medicaid program that it had occurred.

35. Exhibit 1 illustrates the staggered timing of the bump-up in the AWP that the Commonwealth has discovered through its investigation. For each of the more than 1,800 affected NDCs, Exhibit 1 identifies the dates on which the fraudulently inflated AWP was first published.

36. The Commonwealth did not know that the defendants had intentionally inflated the AWP of the NDCs in question or the reasons for the defendants' conduct. That is, the Commonwealth did not know that the defendants had intentionally, and without a commensurate increase in the actual (WAC-based) prices wholesalers charged their retail customers for these drugs, inflated the WAC-to-AWP mark-up for the NDCs in question above the mark-up theretofore set and reported by the manufacturers, or the reasons for the defendants doing so.

37. As a result of the bump-up scheme, the Kentucky Medicaid program overpaid

retailer providers when reimbursing them based on the fraudulently inflated AWP.

IV. TOLLING

38. Any applicable statute of limitations has been tolled by the defendants' knowing and active concealment and/or because the defendants' conduct constitutes a continuing violation. Because of their knowing, affirmative and/or active concealment of their scheme to inflate AWP as described above, the defendants are estopped from relying on any statute of limitations.

39. Any applicable statute of limitations or other time-related defenses such as estoppel, waiver, or laches available to defendant McKesson has been tolled pursuant to the Tolling Agreement executed by the State and McKesson on or about May 12, 2009, attached hereto as Exhibit 2.

V. CAUSES OF ACTION

COUNT I

***PER SE* VIOLATION OF THE KENTUCKY CONSUMER PROTECTION ACT KRS 367.170 THROUGH VIOLATION OF THE KENTUCKY MEDICAID FRAUD STATUTE, KRS 205.8463(4)**

40. Plaintiff hereby incorporates by reference all previous paragraphs.

41. KRS 205.520(2) provides: "The General Assembly of the Commonwealth of Kentucky recognizes and declares that it is an essential function, duty, and responsibility of the state government to provide medical care to its indigent citizenry; and it is the purpose of KRS 205.510 to 205.630 to provide such care."

42. KRS 205.8463(4) provides: "No person shall, in any matter within the jurisdiction of the Cabinet for Health Services under this chapter, knowingly falsify, conceal, or cover-up by any trick, scheme, or device a material fact, or make any false, fictitious, or fraudulent statement

or representation, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry.”

43. KRS 367.170(1) provides: “Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”

44. By engaging in the conduct described above, defendants violated KRS 205.8463, and thereby committed *per se* violations of KRS 367.170(1).

45. Defendants’ violations of KRS 205.8463 and KRS 367.170(1) were willful.

46. Each claim paid by Kentucky Medicaid based on a fraudulently inflated AWP was a violation of KRS 205.8463 and KRS 367.170(1).

47. As a direct result of defendants’ *per se* violations of KRS 367.170 resulting from violations of KRS 205.8463(4), defendants caused damage to the Commonwealth of Kentucky by causing the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWPs than it would have paid had the AWPs not been secretly and fraudulently inflated.

COUNT II

PER SE VIOLATION OF THE KENTUCKY CONSUMER PROTECTION ACT KRS 367.170 THROUGH VIOLATION OF THE KENTUCKY THEFT BY DECEPTION STATUTE, KRS 514.040

48. Plaintiff hereby incorporates by reference all previous paragraphs.

49. KRS 514.040(1) provides: “A person is guilty of theft by deception when the person obtains property or services of another by deception with intent to deprive the person thereof.”

50. KRS 367.170 (1) provides that “Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”

51. By engaging in the conduct described above, defendants violated KRS 514.040, and thereby committed *per se* violations of KRS 367.170(1).

52. Defendants' violations of KRS 514.040 and KRS 367.170(1) were willful.

53. Each claim paid by Kentucky Medicaid based on a fraudulently inflated AWP was a violation of KRS 514.040 and KRS 367.170(1).

54. As a direct result of defendants' *per se* violations of KRS 367.170 resulting from violations of KRS 514.040, defendants caused damage to the Commonwealth of Kentucky by causing the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWPs than it would have paid had the AWPs not been secretly and fraudulently inflated.

COUNT III

PER SE VIOLATION OF THE KENTUCKY CONSUMER PROTECTION ACT KRS 367.170 THROUGH VIOLATION OF THE KENTUCKY FALSE ADVERTISING STATUTE, KRS 517.030

55. Plaintiff hereby incorporates by reference all previous paragraphs.

56. KRS 517.030 provides: "A person is guilty of false advertising when, in connection with the promotion of the sale of or to increase the consumption of property or services, he knowingly makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial number of persons."

57. KRS 367.170 (1) provides that "Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

58. By engaging in the conduct described above, defendants violated KRS 517.030, and thereby committed *per se* violations of KRS 367.170(1).

59. Defendants' violations of KRS 517.030 and KRS 367.170(1) were willful.

60. Each claim paid by Kentucky Medicaid based on a fraudulently inflated AWP was a violation of KRS 517.030 and KRS 367.170(1).

61. As a direct result of defendants' *per se* violations of KRS 367.170 resulting from violations of KRS 517.030, defendants caused damage to the Commonwealth of Kentucky by causing the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWPs than it would have paid had the AWPs not been secretly and fraudulently inflated.

COUNT IV

VIOLATION OF THE KENTUCKY CONSUMER PROTECTION ACT KRS 367.170

62. Plaintiff hereby incorporates all previous paragraphs.

63. KRS 367.170 (1) provides: "Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

64. By engaging in the conduct described above, defendants committed violations of KRS 367.170(1).

65. Defendants' violations of KRS 367.170(1) were willful.

66. Each claim paid by Kentucky Medicaid based on a fraudulently inflated AWP was a violation of KRS 367.170(1).

67. As a direct result of defendants' violations of KRS 367.170(1), defendants caused damage to the Commonwealth of Kentucky by causing the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWPs than it would have paid had the AWPs not been secretly and fraudulently inflated.

COUNT V

**VIOLATIONS OF KENTUCKY MEDICAID
FRAUD STATUTE
KRS 205.8463 (4), KRS 446.070**

68. Plaintiff hereby incorporates by reference all previous paragraphs.

69. KRS 205.8463(4) provides: “No person shall, in any matter within the jurisdiction of the Cabinet for Health Services under this chapter, knowingly falsify, conceal, or cover-up by any trick, scheme, or device a material fact, or make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry.”

70. KRS 446.070 provides that: “A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.”

71. By engaging in the conduct described above, defendants violated KRS 205.8463(4).

72. As a direct result of defendants’ violations of KRS 205.8463 (4), defendants caused damage to the Commonwealth of Kentucky by causing the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWP than it would have paid had the AWP not been secretly and fraudulently inflated.

COUNT VI

**VIOLATIONS OF KENTUCKY
THEFT BY DECEPTION STATUTE
KRS 514.040, KRS 446.070**

73. Plaintiff hereby incorporates by reference all previous paragraphs.

74. KRS 514.040(1) provides: “A person is guilty of theft by deception when the

person obtains property or services of another by deception with intent to deprive the person thereof.”

75. KRS 446.070 provides that: “A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.”

76. By engaging in the conduct described above, defendants violated KRS 514.040.

77. As a direct result of defendants’ violations of KRS 514.040, defendants caused damage to the Commonwealth of Kentucky by causing the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWP than it would have paid had the AWP not been secretly and fraudulently inflated.

COUNT VII

VIOLATIONS OF KENTUCKY FALSE ADVERTISING STATUTE KRS 517.030, KRS 446.070

78. Plaintiff hereby incorporates by reference all previous paragraphs.

79. KRS 517.030 provides: “A person is guilty of false advertising when, in connection with the promotion of the sale of or to increase the consumption of property or services, he knowingly makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial number of persons.”

80. KRS 446.070 provides that: “A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.”

81. By engaging in the conduct described above, defendants violated KRS 517.030.

82. As a direct result of defendants’ violations of KRS 517.030, defendants caused

damage to the Commonwealth of Kentucky by causing the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWP than it would have paid had the AWP not been secretly and fraudulently inflated.

COUNT VIII

COMMON LAW FRAUD (Fraudulent Misrepresentation and Fraudulent Omission)

83. Plaintiff hereby incorporates by reference all previous paragraphs.

84. Defendants fraudulently inflated AWP published by First DataBank and provided to the Commonwealth, and intentionally concealed this fact, and their reasons for doing so, from the Commonwealth.

85. The defendants' fraudulently inflated AWP constituted material representations which were false, and which the defendants knew to be false. The defendants made such false representations with the intent that payors, including the Kentucky Medicaid program, would rely on them.

86. Defendants had a duty (arising from, among other things, the intentionally fraudulent publication and First DataBank's license agreements with the Commonwealth and/or its fiscal agents) to disclose to the Commonwealth that it was the defendants (and not the manufacturers who had historically set and controlled AWP) who had increased the historical 20% WAC-to-AWP markups for the bumped-up drugs and that the increase was done despite the fact that there had been no commensurate increase in the actual (WAC-based) prices charged by wholesalers to their retail customers such as pharmacies and that the increase in the AWP were published by the defendants solely in order to increase the amount of money the Commonwealth would pay these pharmacies for those drugs above the reimbursements they would have paid had the AWP not been secretly and fraudulently inflated.

87. These undisclosed facts were material to the Kentucky Medicaid program.

88. The Commonwealth did not know about the scheme. The defendants failed to disclose it and took affirmative steps to conceal it from the Commonwealth.

89. The defendants' inflation of the AWP's with the intent to conceal from the Commonwealth their role and reasons for doing so, as well as their failure to disclose their role in the scheme, and their affirmative efforts to conceal it, were fraudulent.

90. The Commonwealth relied to its detriment on the fraudulently inflated AWP's when it used them to determine how much to reimburse retail providers, and did so reasonably.

91. As a result, the Commonwealth overpaid providers millions of dollars more for the affected drugs than it would have paid had the AWP's not been secretly and fraudulently inflated. Accordingly, defendants committed common law fraud.

COUNT IX

NEGLIGENT MISREPRESENTATION SECTION 522, RESTATEMENT (SECOND) OF TORTS

92. Plaintiff hereby incorporates by reference all previous paragraphs.

93. Defendants, in the course of their business, supplied the Commonwealth with fraudulently inflated AWP's which defendants knew the Commonwealth would utilize in reimbursing providers.

94. The Commonwealth justifiably relied on the AWP's as provided by defendants.

95. Defendants did not use care or competence when providing AWP's to the Commonwealth.

96. The Commonwealth has been damaged by defendants' negligent misrepresentations in that the misrepresentations caused the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWP's than it would have

paid had the AWP's not been secretly and fraudulently inflated.

COUNT X

CIVIL CONSPIRACY

97. Plaintiff incorporates by reference all previous allegations herein.

98. First DataBank and McKesson formed a conspiracy to fraudulently inflate the AWP's published by First DataBank by increasing the WAC-to-AWP mark-up from 20% to 25%, then effectuated the conspiracy by publishing the fraudulently inflated AWP's without disclosing what they had done, and further agreed (as part of the conspiracy) to take, and did take, affirmative steps to conceal the scheme and their role in it.

99. First DataBank and McKesson committed an unlawful act or acts in furtherance of this conspiracy to defraud Kentucky and violate its statutes and common law as set forth herein in Counts One through Nine.

100. First DataBank and McKesson's conspiracy caused damage to the Commonwealth of Kentucky by causing the Kentucky Medicaid program to pay more when it reimbursed providers based on the fraudulently inflated AWP's than it would have paid had the AWP's not been secretly and fraudulently inflated.

VI. DEMAND FOR JURY TRIAL

The Plaintiff Commonwealth of Kentucky hereby demands a trial by jury of all claims for which a trial by jury is authorized by law.

VII. PRAYER FOR RELIEF

WHEREFORE, the plaintiff, Commonwealth of Kentucky, by counsel, Attorney General Jack Conway, prays for a judgment:

1. Declaring that each defendant committed repeated knowing and willful *per se* violations of KRS 367.170 by violating KRS 205.8463(4);
2. Declaring that each defendant committed repeated knowing and willful *per se* violations of KRS 367.170 by violating KRS 514.040;
3. Declaring that each defendant committed repeated knowing and willful *per se* violations of KRS 367.170 by violating KRS 517.030;
4. Declaring that each defendant committed repeated willful violations of KRS 367.170;
5. Declaring pursuant to KRS 446.070 that each defendant committed repeated violations of KRS 205.8463(4);
6. Declaring pursuant to KRS 446.070 that each defendant committed repeated violations of KRS 514.040;
7. Declaring pursuant to KRS 446.070 that each defendant committed repeated violations of KRS 517.030;
8. Declaring that each defendant engaged in repeated acts of common law fraud;
9. Declaring that each defendant engaged in repeated acts of negligent misrepresentation;
10. Permanently enjoining each defendant, and its employees, officers, directors, agents, successors, assigns, affiliates, merged or acquired predecessors, parent or controlling entities, subsidiaries, and any and all persons acting in concert or participation with each defendant, from continuing its unlawful conduct, acts and practices;
11. Awarding damages caused as a result of each defendant's unlawful conduct pursuant to, *inter alia*, KRS 367.200, 446.070, and common law;
12. Awarding civil penalties of \$2,000 for each willful violation of the Kentucky Consumer Protection Act pursuant to KRS 367.990(2);

13. Awarding civil penalties of \$10,000 for each willful violation of the Kentucky Consumer Protection Act pursuant to KRS 367.990 (2), where defendants' conduct was directed at a person aged sixty (60) or older;
14. Awarding punitive damages pursuant to KRS 411.184;
15. Awarding costs and attorneys' fees;
16. Awarding prejudgment interest as permitted by law;
17. Awarding post-judgment interest as permitted by law;
18. Ordering an accounting of all profits or gains derived in whole or in part by each defendant through the misconduct complained of herein and disgorgement of all improper and ill-gotten profits;
19. Awarding any other relief to which the Commonwealth is entitled or the Court deems appropriate and just.

Respectfully Submitted,

JACK CONWAY
Attorney General of Kentucky

By: _____
C. David Johnstone
LeeAnne Applegate
Todd E. Leatherman
OFFICE OF THE ATTORNEY GENERAL
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601
(502) 696-5300
(502) 573-7150 fax

Counsel for Plaintiff Commonwealth of Kentucky